SUPREME COURT, U. S.
FILED
FEB 14 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1035

EDWARD LECCI, individually and as President of the Nassau County Patrolmen's Benevolent Association,
Petitioners

—against—

WILLIAM CAHN, District Attorney of Nassau County of the State of New York, FRANCIS B. LOONEY, Commissioner of Police Nassau County, State of New York,
Respondents

Petition for a Writ of Certiorari to the Court of Appeals for the State of New York

RICHARD HARTMAN, ESQ.
Counsel for Petitioners
Office & Post Office Address
300 Old Country Road
Mineola, New York 11501

INDEX

	Page
Citations to Opinions Below	1
Jurisdiction	2
Questions presented	2
Constitutional Provisions, Statutes, Rules, Etc., Involved	2
Statement	2
Basis for Granting the Writ	3
Conclusion	5
Appendix	6

CITATIONS

Cases:

Ex Parte Curtis, 106 U.S. 371 (1882), 1 S. Ct. 381	4
United Federal Workers v. *Mitchell,* 56 F Supp. 621 (1944)	4
Sarlls v. *State,* 201 Ind. 88 (1929) 166 N.E. 270	4
McAuliffe v. *New Bedford,* 155 Mass 216 (1892), 29 N.E. 517	4
Com. v. *McCarthy,* 281 Mass 253 (1932), 183 N.E. 495	4
Stowe v. *Ryan,* 135 Or 371 (1931), 296 p. 857	4

Statutes and Constitutional Provisions:

First Amendment to the United States Constitutiton	11
Artice I, Section 8 of the New York State Constitution	11
Section 326 of the Election Law of the State of New York	12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

EDWARD LECCI, individually and as President of the Nassau County Patrolmen's Benevolent Association,
Petitioners

— against —

WILLIAM CAHN, District Attorney of Nassau County of the State of New York, FRANCIS B. LOONEY, Commissioner of Police Nassau County, State of New York,
Respondents

Petition for a Writ of Certiorari to the Court of Appeals for the State of New York

---

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the State of New York entered on November 17, 1971.

Citations to Opinions Below

The opinion of Special Term, Supreme Court, Nassau County, State of New York granting Respondents' (Defendants') motion for declaratory judgment wherein the statute in question was declared to be constitutional, is printed in Appendix C. The Appellate Division of the Supreme Court unanimously affirmed the findings of Special Term without opinion, the text of which is reported at 325 NYS 2d 400 (1971) and is printed in Appendix B.

The opinion of the Court of Appeals of the State of New York denying Petitioners' motion for leave to appeal is printed in Appendix A and as yet has not been reported in the official reports.

Jurisdiction

The judgment of the Court of Appeals was entered on November 17, 1971. The Court of Appeals by its action denied Petitioners' motion for leave to appeal thereby exhausting Petitioners' state remedies.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

The Question Presented

Whether Section 426, subdivision 3 of the Election Law of the State of New York is constitutional.

Constitutional Provisions, Statutes, Rules, Etc., Involved

The constitutional provisions involved are the First Amendment to the United States Constitution with regards to freedom of speech as made applicable to the states through the Fourteenth Amendment and Article 1, Section 8 of the New York State Constitution, the state counterpart to the First Amendment of the United States Constitution and Section 426, subdivision 3 of the Election Law of the State of New York. These provisions are printed in Appendix D.

Statement

Petitioner is a member of the Nassau County Police Department and is the president of the Nassau County Patrolmen's Benevolent Association. He instituted an ac-

tion for Declaratory Judgment, asking the Court to declare as unconstitutional Section 426, Subdivision 3 of the Election Law of the State of New York. Said Subdivision 3 of Section 426 of the Election Law states:

"§ 426. Misdemeanors concerning police commissioners or officers or members of any police force.

Any person who, being a police commissioner or an officer or member of any police force in this state:

1. .....

2. .....

3. Contributes any money, direct or indirectly, to, or solicits, collects or receives any money for, any political fund, or joins or becomes a member of any political club, association, society or committee,

Is guilty of a misdemeanor."

The Petitioners (Plaintiffs) moved at Special Term, Supreme Court, Nassau County, New York to have the statute declared unconstitutional. By decision of Special Term, the statute was declared to be constitutional (Appendix C). The Appellate Division of the Supreme Court unanimously affirmed the findings of Special Term without opinion (Appendix B) and the Court of Appeals denied Petitioners motion for leave to appeal (Appendix A) thereby exhausting Petitioner's state remedies.

Basis For Granting The Writ

This Petition raises substantial and important questions concerning the rights of an individual recognized and protected by the First Amendment to the United States Constitution and Article 1, subdivision 8 of the New York State Constitution, to wit, the right of free speech as expanded to encompass political activity. In particular, under

Section 426, subdivision 3 of the Election Law of the State of New York, a police officer, merely by contributing one cent to a political fund, criminally violates Section 426, subdivision 3 of the Election Law of the State of New York and subjects himself to a $1,000.00 fine and up to a year in prison.

There should be no question that the above is an unreasonably harsh restraint upon a Police Officer's guaranteed right as recognized under the United States as well as New York State Constitutions to engage in some form of political expression; namely, the right to make an unsolicited and uncoerced monetary contribution to a political fund.

The cases to date that have interpreted legislative provisions and administrative regulations prohibiting public officers and employees from engaging in various forms of political activity have all been concerned with removing the public employee from an active role in the political process as well as avoiding the situation wherein contributions are coerced from a public employee under threat that refusal to contribute would result in the loss of his job. (see *Ex parte Curtis*, 106 US 371 (1882), 1 S CT 381; *United Federal Workers* v. *Mitchell*, 56 F Supp 621 (1944); *Sarlls* v. *State*, 201 Ind. 88 (1929), 166 NE 270; *McAuliffe* v. *New Bedford*, 155 Mass 216 (1892), 29 NE 517; *Com.* v. *McCarthy*, 281 Mass 253 (1932), 183 NE 495; *Stowe* v. *Ryan*, 135 or 371 (1931), 296 P. 857)

Petitioners respectfully submit to the Court that the evils of coerced contributions from public employees as well as active participation by said employees in political activities, can be avoided if so desired by a legislature. However, under the wording of Section 426 subdivision 3 of the Election Law of the State of New York, the New York State legislature has attempted to impose restraints upon a public employee that go beyond the avoidance of the above

recognized evils. As stated previously, said statute denies a Police Officer the right to make voluntary and unsolicited monetary contributions to a political fund of his own choosing. Such a restraint flies in the face of the recognized rights of a citizen, be he a public employee, or otherwise, to enter into political activity guaranteed under the "freedom of speech" doctrine set forth in the United States and New York State Constitutions. Petitioners respectfully submit to the Court that the above cited cases that have dealt with this question in no way stand as support for the proposition that legislation is constitutional that makes illegal unsolicited and uncoerced contributions to a political fund by a public employee.

CONCLUSION

For the reasons stated above, Petitioners, respectfully submit that this Petition for a Writ of Certiorari be granted.

RICHARD HARTMAN, ESQ.
Counsel for Petitioners
Office & Post Office Address
300 Old Country Road
Mineola, New York 11501

Order Denying Motion for Leave to Appeal

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Seventeenth day of November A.D. 1971.

Present, HON. STANLEY H. FULD, *Chief Judge, presiding.*

(Same Title)

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied.

(Seal)

A copy

GEORGE KIMBALL
Deputy Clerk

Opinion of Appellate Division, Second Department

Edward LECCI, etc., Appellant, v. William CAHN, District Attorney of Nassau County, etc., et al., Respondents.

Supreme Court, Appellate Division, Second Department. Sept. 27, 1971. Richard Hartman, Mineola, for plaintiff-appellant. Joseph Jaspan, County Atty. of Nassau County, Mineola, for defendants-respondents; Bonnie Singer, Deputy County Atty., of counsel. Judgment of the Supreme Court, Nassau County, dated February 26, 1971, affirmed, without costs (see Matter of Lecci v. Looney, 33 A.D. 2d 916, 307 N.Y.S. 2d 594).

SAMUEL RABIN, P. J., and HOPKINS, MUNDER, LATHAM and SHAPIRO, JJ., concur.

Memorandum Decision of Justice Velsor

SUPREME COURT

NASSAU COUNTY, SPECIAL PART I

Index No. 11345/70. Cal. No. 52, 10/26/70.

By Velsor, J.
Dated: November 30, 1970.

(Same Title)

RICHARD HARTMAN, ESQ.
Attorney for Plaintiff
300 Old Country Road
Mineola, N. Y. 11501

MORRIS H. SCHNEIDER
County Attorney of Nassau County
Attorney for Defendants
Nassau County Executive Building
Mineola, New York

Defendant moves to dismiss the complaint in this action for a declaratory judgment. Upon such a motion, the complaint is not dismissed unless it is clear that a declaratory judgment is not a proper remedy (see *Dun & Bradstreet Inc.* v. *City of New York*, 276 N. Y. 198, 207). If there is a right to a declaration, dismissal must be denied (*Plaza Mgt. Co.* v. *City Rent Agency*, 31 A D 2d 347, 350 affd. 25 N Y 2d 630); and where no issues of fact are present, the appropriate declaration should be made (*St. Lawrence Univ.* v. *Theological School of St. Lawrence University*, 20 N Y 2d 317).

The complaint in this action seeks a declaration that Election Law, section 426 (3) is unconstitutional. The statute provides in pertinent part that a member of a police

force who contributes money to, or solicits, collects, or receives any money for any political fund, or becomes a member of any political club, association, society, or committee is guilty of a misdemeanor. For the purposes of this motion, no issues of fact are raised, the allegations of fact in the complaint being deemed true. Under the circumstances, this Court will proceed in the manner prescribed in *Plaza Mgt. Co.* v. *City Rent Agency* (31 A.D.2d 347, 350, affd. 25 N Y 2d 630).

In the opinion of this Court, the reasoning of the Appellate Division in *Matter of Lecci* v. *Looney* (33 A D 2d 916) in dealing with rule 14, art. 6 of the Rules and Regulations of the Nassau County Police Department is equally applicable to the statute (Election Law, section 426 (3)).

In the cited case wherein the right of the Nassau County Police Department to promulgate a rule (rule 14, art 6), which prohibited certain political activities on the part of members of the force, was challenged in an Article 78 proceeding, the constitutionality of the rule was specifically raised. In disposing of the question, the Court stated on p. 917, "In our opinion the subject rule comports with sound administration policy that the removal of police personnel from active politics and from active participation in any movement for the nomination of election of candidates for political or public office is conducive to effective maintenance of discipine and the preservation and promotion of the integrity and efficiency of the Police department and its personnel. Accordingly, the promulgation of the subject rule, applicable to those who seek employment or seek to be retained in the employ of the Police Department, is the Commissioner's prerogative, and in our opinion, is not vulnerable to petitioner's aforesaid challenges."

In *People ex rel Clifford* v. *Scannell*, 74 App. Div. 406, affd. 173 N. Y. 606, cited with approval in *Lecci, supra*, the Court disposed of the argument as to unconstitutionality in

the following language at pp. 413-414, "It is said, however, that unless the acts of the relator in this respect be upheld, then his rights as a citizen are abridged, and, therefore, the act and the rule are in violation of the State Constitution (Art. 1, §§ 1,8). There is no foundation for the claim either in law or reason. Neither the fire department, acting through its officers, nor the Legislature of the State, has in the slightest degree abridged the rights of the relator in any respect. . . . It is, therefore, erroneous to say that his right of citizenship is abridged in any particular, and the courts have so held." (citing cases)

In the light of the foregoing authorities, the motion is granted to the extent of awarding summary judgment to the respondents declaring the statute in question to be constitutional.

Settle judgment on notice.

J. S. C.

Amendment I of the United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Article I of the New York State Constitution

§ 8. [Freedom of speech and press; criminal prosecutions for libel.]

Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

Election Law of the State of New York

§ 426. Misdemeanors concerning police commissioners or officers or members of any police force.

Any person who, being a police commissioner or an officer or member of any police force in this state:

1. Uses or threatens or attempts to use his official power or authority, in any manner, directly or indirectly, in aid of or against any political party, organization, association or society, or to control, affect, influence, reward or punish, the political adherence, affiliation, action, expression or opinion of any citizen; or

2. Appoints, promotes, transfers, retires or punishes an officer or member of a police force, or asks for or aids in the promotion, transfer, retirement or punishment of an officer or member of a police force because of the party adherence or affiliation of such officer or member, or for or on the request, direct or indirect, of any political party, organization, association or society, or of any officer, member of committee or representative official or otherwise of any political party, organization, association or society; or,

3. Contributes any money, directly or indirectly, to, or solicits, collects or receives any money for, any political fund, or joins or becomes a member of any political club, association, society or committee,

Is guilty of a misdemeanor.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAR 22, 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1035

EDWARD LECCI, individually and as President of the Nassau County Patrolmen's Benevolent Association,
Petitioners,

— against —

WILLIAM CAHN, District Attorney of Nassau County of the State of New York, FRANCIS B. LOONEY, Commissioner of Police Nassau County, State of New York,
Respondents

Brief in Opposition to Petition for a Writ of Certiorari to the Court of Appeals for the State of New York.

JOSEPH JASPAN
County Attorney of Nassau County
Attorney for Respondents
Nassau Cty. Exec. Bldg.
Mineola, N.Y. 11501
535-4406

BIAGIO F. GIAQUINTO
Senior Deputy County Attorney
NATALE C. TEDONE
Deputy County Attorney
of Counsel

TABLE OF CONTENTS

	Page
Argument in Opposition to Granting a Writ of Certiorari	1
POINT I.—Section 426(3) of the Election Law of the State of New York is valid and constitutional	1
CONCLUSION	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1035

EDWARD LECCI, individually and as President of the Nassau County Patrolmen's Benevolent Association,

Petitioners,

— against —

WILLIAM CAHN, District Attorney of Nassau County of the State of New York, FRANCIS B. LOONEY, Commissioner of Police Nassau County, State of New York,

Respondents

Argument in Opposition to Granting a Writ of Certiorari.

POINT I

Section 426(3) of the Election Law of the State of New York is valid and constitutional.

The entire substance of the complaint served by appellant deals with the alleged unconstitutionality of Section 426(3) of the Election Law of the State of New York. Appellant, prior to this action, instituted an Article 78 proceeding against Francis B. Looney, Commissioner of Police, in which he sought to have Article VI, Rule 14 of the Rules and Regulations of the Nassau County Police Department declared invalid and unconstitutional. Said rule also prohibits participation by police officers in the field of party politics.

Mr. Justice Wachtler, in dismissing the petition, stated in part that policemen are precluded from actively participating in partisan political affairs for fear that the authority and influence with which they are vested by the public could be used unfairly. It was further held that this restriction is not dissimilar in nature or thrust to the Hatch Act as it relates to Federal employees.

The appellant appealed to the Appellate Division of the Supreme Court from the dismissal of the petition. The determination below was unanimously affirmed in a decision, which held in part, that Article VI, Rule 14, comports with sound administration policy, and that the removal of police personnel from active politics, and from active participation in any movement for the nomination or election of candidates for political or public office is conducive to the effective maintenance of discipline, and the preservation, and promotion of the integrity and efficiency of the Police Department and its personnel. *Lecci* v. *Looney* 33 A.D. 2d 916, 307 N.Y.S. 2d 594 (2d Dept. 1970). In effect, that decision held that the exclusion of the police personnel from politics did not abridge their constitutionally guaranteed freedoms of press, speech, assembly and petition. The substance of the decision dealt with the entire subject matter of Section 426(3) of the Election Law of the State of New York.

Although research discloses that no prior cases have been decided by the Courts in New York dealing directly with Election Law §426(3) the restrictions imposed by this section are similar to those imposed by 5 U.S.C.A. §7324 (commonly known as the Hatch Act).

This section provides that "No officer or employee in the Executive branch of the Federal Government . . . shall take an active part in political management or in political campaigning . . ." The Supreme Court of the United States has ruled that the need to protect against the possible evils

of political partisanship justify such legislation, and it is therefore immune from constitutional attack. *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1946).

The present section 426(3) of the Election Law was added in 1965 in place of §756 of the former Penal Law of 1909. The case of *McAvoy* v. *Press Pub. Co.*, 114 App. Div. 540,99 N.Y. Supp. 1041 (1st Dept. 1906) deals with the constitutionality of the predecessor to said section of the Penal Code, now contained in Election Law §426(3). Mr. McAvoy was an active member of a political organization and was appointed Deputy Police Commissioner. The Court observed:

> "The intent of the statute is obvious. It was to keep the police out of active, open participation in party politics and the management thereof ... If he desired to accept the office, his duty was to resign from his political association ... That the policy so indicated is wise, no one will deny. That it is lawful to make such a requirement as an incident of holding the office must be admitted."

In light of the decisions on similar statutes, and the reasonableness of prohibiting policemen from participation in party politics, it is respectfully submitted that §426(3) of the Election Law of the State of New York is constitutional in every respect.

CONCLUSION

For all of the reasons stated above, the decision below should be affirmed.

Respectfully submitted,

JOSEPH JASPAN
County Attorney of Nassau County
Attorney for Respondents
Nassau Cty. Exec. Bldg.
Mineola, N.Y. 11501
535-4406

BIAGIO F. GIAQUINTO
Senior Deputy County Attorney
NATALE C. TEDONE
Deputy County Attorney
of Counsel